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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 601

THE STATE OF WYOMING and GULF OIL CORPORATION,
Petitioners,

VERSUS

STEWART L. UDALL, individually and as Secretary of the Interior; ED PIERSON, individually and as Supervisor for the State of Wyoming, Bureau of Land Management, Department of the Interior; DAVID B. MORGAN, Acting Manager, Oil and Gas, Cheyenne, Wyoming Land Office, Bureau of Land Management, Department of the Interior, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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THE STATE OF WYOMING and GULF OIL CORPORATION,
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STEWART L. UDALL, individually and as Secretary of the Interior; ED PIERSON, individually and as Supervisor for the State of Wyoming, Bureau of Land Management, Department of the Interior; DAVID B. MORGAN, Acting Manager, Oil and Gas, Cheyenne, Wyoming Land Office, Bureau of Land Management, Department of the Interior, and UNION PACIFIC RAILROAD COMPANY, a corporation,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of Wyoming and Gulf Oil Corporation pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on June 14, 1967.

OPINIONS BELOW

The opinions of the Director, Bureau of Land Management (Appendix A, *infra*, pp. i-viii) are not reported.

The opinion of the Secretary of the Interior (Appendix A, *infra*, pp. ix-xviii) is reported at 72 I.D. 76.

The District Court did not write an opinion. Its findings of fact and conclusions of law, as amended (Appendix A, *infra*, pp. xix-xxix) are reported at 255 F.Supp. 481.

The opinion of the Court of Appeals (Appendix A, *infra*, pp. xxx-xxxix) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Appendix A, *infra*, p. xl) is dated and was entered June 14, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the school land grant to the State of Wyoming made by the Act of July 10, 1890, 26 Stat. 222, reserved to the United States or granted to the State the oil and gas deposits underlying those portions of the granted sections which are traversed by the right-of-way previously granted to The Union Pacific Railroad Company by the Act of July 1, 1862, 12 Stat. 489.

STATUTES INVOLVED

Sections 4 and 13 of the Act of July 10, 1890, 26 Stat. 222 and 224, provide:

> "SEC. 4. That sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter sec-

tion, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That section six of the act of Congress of August ninth, eighteen hundred and eighty-eight, entitled 'An act to authorize the leasing of the school and university lands in the Territory of Wyoming, and for other purposes,' shall apply to the school and university indemnity lands of the said State of Wyoming so far as applicable."

"SEC. 13. That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivision or portion of any smallest subdivision thereof in any township, shall be found by the Department of the Interior to be mineral lands, said State is hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said State in lieu thereof, for the use and the benefit of the common schools of said State."

Sections 2 and 3 of the Act of July 1, 1862, 12 Stat. 489, 491-492, provide:

"SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all neces-

sary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made."

"SEC. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

Section 4 of the Act of July 2, 1864, 13 Stat. 356, 358, amending the Act of July 1, 1862, provides:

"SEC. 4. *And be it further enacted,* That section three of said act be hereby amended by striking out the word 'five,' where the same occurs in said section, and by inserting in lieu thereof the word 'ten'; and by

striking out the word 'ten,' where the same occurs in said section, and by inserting in lieu thereof the word 'twenty.' And section seven of said act is hereby amended by striking out the word 'fifteen,' where the same occurs in said section, and inserting in lieu thereof the word 'twenty-five.' And the term 'mineral land,' wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any preemption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturalist, to be ascertained under such rules as have been or may be established by the commissioner of the general land-office, in conformity with the provisions of the preemption laws: *Provided,* That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturalist, and such quantity for each settler who claims as a miner, as the said commissioner may establish by general regulation: *Provided, also,* That the phrase 'but where the same shall contain timber, the timber thereon is hereby granted to said company,' in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled 'an act donating lands to the several states and territories which may provide colleges for the benefit of

agriculture and the mechanic arts,' approved July second, eighteen hundred and sixty-two, and notice thereof given at the proper land-office."

The pertinent provisions of the Right of Way Leasing Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. § 301, *et seq.*, provide:

"§ 301. Authorization for lease of oil and gas deposits; by and to whom leased

"Whenever the Secretary of the Interior shall deem it to be consistent with the public interest he is authorized to lease deposits of oil and gas in or under lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee or mere easement: *Provided*, That, except as hereinafter authorized, no lease shall be executed hereunder except to the municipality, corporation, firm, association, or individual by whom such right of way was acquired, or to the lawful successor, assignee, or transferee of such municipality, corporation, firm, association, or individual. May 21, 1930, c. 307, § 1, 46 Stat. 373."

"§ 303. Conditions precedent to award of lease; preferred class; bidding

"Prior to the award of any lease under section 301 of this title, the Secretary of the Interior shall notify the owner or lessee of adjoining lands and allow him a reasonable time, to be fixed in the notice given, within which to submit an offer or bid of the amount or percentage of compensatory royalty that such owner will agree to pay for the extraction through wells on his or its adjoining land, of the oil or gas under and from such adjoining right of way, and at the same time afford the holder of the railroad or other right of way a like opportunity within the same time to submit its bid or offer as to the amount or percentage of royalty it will agree to pay, if a lease for the extraction of the

oil and gas deposits under the right of way be awarded to the holder of such right of way. In case of competing offers by the said parties in interest, the Secretary shall award the right to extract the oil and gas to the bidder, duly qualified, making the offer in his opinion most advantageous to the United States. In case but one bid or offer is received after notice duly given, he may, in his discretion, award the right to extract the oil and gas to such bidder. May 21, 1930, c. 307, § 3, 46 Stat. 374."

STATEMENT

Petitioners brought this action in the District Court against the Secretary of the Interior and his subordinates to review, set aside as contrary to law and enjoin enforcement of a decision of the Secretary that the United States owned, and that directed his subordinates to dispose of pursuant to the Right of Way Leasing Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. §§ 301-306 (*supra*, pp. 6-7), the oil and gas deposits underlying those portions of the right-of-way of the Union Pacific Railroad Company (Union Pacific) which traverse two sections of Wyoming school land. The decision was challenged on the sole ground that the State of Wyoming, and not the United States, owned and had the right to lease the oil and gas deposits. These deposits were found by the District Court to have a value in excess of $10,000.00, exclusive of interest and costs (Fdg. 5, App. A, *infra*, p. xxi, R. 58). Thus, the jurisdiction of the District Court was based on 28 U.S.C. § 1331 and §§ 2201-2202, as well as on 28 U.S.C. § 1361 and 5 U.S.C. § 1009. Union Pacific intervened as a defendant. The facts are not in dispute and were either admitted or stipulated.

The two sections of school land in question are Sections 16-18N-99W and 36-19N-99W, Sweetwater County, Wyoming (Fdg. 1, App. A, *infra*, p. xx, R. 57). They were granted to Wyoming by § 4 of the Statehood Act of July 10, 1890, 26 Stat. 222, *supra*, pp. 2-3), which grants Wyoming Sections 16 and 36 in each township and provides that "where such sections or any part thereof have been sold or otherwise disposed of by or under the authority of any act of Congress," other lands may be selected. Prior to the grant of these sections to Wyoming, a predecessor of Union Pacific had constructed its railroad right-of-way across this land and it has never been abandoned and is still in use (Fdg. 6, App. A, *infra*, p. xxii, R. 58-59). It was constructed pursuant to § 2 of the Act of July 1, 1862, 12 Stat. 489, *supra*, pp. 3-4, which granted to the railroad company "the right-of-way through the public lands . . . for the construction of said railroad and telegraph line." Section 3 of the same Act, which granted to the railroad company in fee alternate odd-numbered sections of public land on each side of the railroad in aid of its construction, provides that, "all mineral lands shall be excepted from the operation of this Act," *supra*, p. 4; and § 4 of the amending Act of July 2, 1864, 13 Stat. 356, *supra*, pp. 4-5, which doubled the grant of alternate sections to the railroad, provides that "the term 'mineral land,' whenever the same occurs in this act, or the act to which this is an amendment, shall not be construed to include coal and iron land," *supra*, p. 5.

It was stipulated and accordingly found that the two sections here involved were not of known mineral value when the survey plats were approved and filed in 1877 and 1884 or when they were granted to Wyoming by the Act

of July 10, 1890, and that Wyoming has never made an in-lieu selection for land equivalent to that occupied by Union Pacific as its right-of-way (Stip., pars. 6 and 8, R. 37-38; Fdgs. 7 and 9, App. A, *infra*, pp. xxii-xxiii, R. 59-60). Wyoming reconveyed all of Section 16 to the United States in 1938 and portions of Section 36 in 1950, but in each instance reserved all minerals (Fdg. 10, App. A, *infra*, p. xxiii, R. 60). In 1952 the State issued separate oil and gas leases describing these two sections, except a 14.7-acre tract in Section 36 previously conveyed to Union Pacific and not involved in this action. Both leases were assigned to Gulf Oil Corporation (Gulf) (Fdgs. 11 and 12, App. A, *infra*, pp. xxiii-xxiv, R. 60). The lease covering Section 16 expired during the pendency of these proceedings, but the lease covering Section 36 is in full force and effect.

Such was the condition of title to this land when the administrative proceedings in the Department of the Interior were initiated in 1960 by applications of Union Pacific to the Manager of the Cheyenne Land Office, Bureau of Land Management, for an oil and gas lease covering its right-of-way in Section 16 and another covering its right-of-way in Section 36 pursuant to the Right of Way Leasing Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. §§ 301-306 (*supra*, pp. 6-7). Pursuant to that Act, the Manager issued decisions inviting royalty bids from Union Pacific as the owner of the right-of-way and compensatory royalty bids from Gulf as the owner of the oil and gas leases on the lands adjoining the right-of-way.

Instead of submitting a bid, Gulf appealed these decisions to the Director, Bureau of Land Management, who reversed, holding that in consequence of this Court's de-

cision in *United States* v. *Union Pacific R. Co.*, 353 U.S. 112 (1957), that the 1862 right-of-way grant did not convey any minerals to the railroad, it followed that the retained mineral rights vested in Wyoming upon the later grant to it of the traversed sections as school lands. App. A, *infra*, pp. i-viii.

Union Pacific appealed these decisions to the Secretary of the Interior, who reversed and remanded the proceedings for further action pursuant to the Right of Way Leasing Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. §§ 301-306, consistent with ownership by the United States of the oil and gas deposits underlying the right-of-way. 72 I.D. 76, App. A, *infra*, pp. ix-xviii. The basis of the Secretary's decision was that this Court had not held this right-of-way to be an easement in *Union Pacific*, as it had held post-1871 rights-of-way to be in *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262 (1942); accordingly, he held that the rule that the servient estate in a railroad right-of-way passes without mention on conveyance of the encumbered tract does not apply to this right-of-way as it does to post-1871 rights-of-way.

Petitioners then filed this action in the District Court, which upheld the Secretary's decision, but upon a different interpretation of this Court's decision in *Union Pacific*. It concluded that, since that decision had held that the exception of "mineral lands" in the railroad's grant was to be construed as a reservation to the United States of all mineral rights in the right-of-way, the exception of "mineral lands" from Wyoming's school land grant should receive a like construction. App. A, *infra*, pp. xix-xxix.

Petitioners then appealed to the Court of Appeals. It too held that the oil and gas deposits under the right-of-way were excluded from Wyoming's school land grant, but upon a still different construction of the applicable statutes and interpretation of this Court's decision in *Union Pacific*. It held that, in consequence of § 4 of the 1864 Act removing coal and iron land from the "mineral lands" exception in the railroad's grant, the railroad owned the coal and iron deposits underlying its right-of-way and that because of such ownership, Wyoming acquired no interest in the right-of-way upon the later grant to it of the traversed sections. App. A, *infra*, pp. xxx-xxxix.

It is this decision which petitioners ask this Court to review.

REASONS FOR GRANTING THE WRIT

This is the first case to present for decision the conflicting claims of the United States and one of its grantees of a tract of public land to the oil and gas deposits underlying that portion of the granted tract which is traversed by a railroad right-of-way previously granted by the United States. This Court has held that the United States did not grant these deposits to the railroad companies either under the 1862 Act here in question, *United States* v. *Union Pacific R. Co.*, 353 U.S. 112 (1957), or under the General Right of Way Act of 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939, *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262 (1942). In those cases the parties were the United States and the railroad companies, the United States was the owner of the tracts traversed by the rights-of-way, and this Court noted in *Great Northern* that, if it had not been,

it would not have been entitled to judgment. 315 U.S. at 279-280. Here it is unquestioned that the United States granted to Wyoming the full fee simple title to both the surface and minerals in the two traversed tracts, and that Wyoming still owns the minerals. The only issue is whether the grant also included the servient estate in the right-of-way, including the oil and gas deposits. The Court of Appeals correctly noted that "the question is one of first impression."

Although the question is novel, construction of the applicable statutes is not, and the Court of Appeals has construed them in a manner which is not in accord with this Court's construction in *Union Pacific*. The Court of Appeals assumed, without discussion, that this Court left open the question whether § 4 of the amending Act of 1864 removing coal and iron land from the "mineral lands" exemption contained in the 1862 Act, had any effect on the railroad's right-of-way grant.

Proceeding on this assumption and the "narrow holding" of *Union Pacific* "that the railroad did not get title to the underlying oil and gas by virtue of the statutory grant," App. A. *infra*, p. xxxviii, the Court of Appeals construed the effect of the 1864 amendment to be that by the 1862 Act:

> "the railroad not only received a right-of-way with the perpetual and exclusive use of the surface, but also received the right to explore for, develop and mine the underlying coal and iron."

It concluded that Union Pacific's right to mine the coal and iron elevated its estate in the right-of-way to more than a "surface easement" and that, accordingly, "title to the

servient estate did not pass with the conveyance of the encumbered tract." App. A, *infra*, p. xxxix. But, in construing §§ 2 and 3 of the 1862 Act in *Union Pacific*, this Court said:

> "The proviso [of §3 of the 1862 Act excepting all 'mineral lands'] makes sense if it is read to reserve *all mineral rights* under the right-of-way as well as to reserve mineral lands in the alternate sections of public lands granted in aid of the construction of the road." 353 U.S. at 115. (Emphasis ours.)

This Court did not note that coal or iron or any other minerals were not embraced in the reservation of "all mineral rights" nor did it note that it considered the "coal and iron land" provision of § 4 of the 1864 Act to be an irrelevant consideration in its construction of the 1862 Act. Moreover, in concluding its review of *Northern Pacific R. Co.* v. *Townsend*, 190 U.S. 267 (1903), and the eight other limited-fee cases which had previously construed these same or like statutes, it said:

> "The most that the limited-fee cases decided was that the railroads received all surface rights to the rights-of-way and all rights incident to a use for railroad purposes."

There is thus no precedent to support the Court of Appeals' conclusion that these statutes granted the railroads any mineral rights in the right-of-way. Its ruling that they did is not in accord with their construction by this Court, unless the Court of Appeals was correct in its assumption that *Union Pacific* left open for future decision the construction of § 4 of the amending Act of 1864.

But if it did, its construction by the Court of Appeals is not in accord with the considerations of principle and policy which guided this Court in *Union Pacific*, which are equally applicable here and which dictate the conclusion that § 4 of the 1864 Act should be restricted to the grant of alternate sections in § 3 of the 1862 Act and not extended to the right-of-way granted by § 2. These considerations were that the grant of "the right-of-way" describes a lesser interest than the grant of "public land," *Union Pacific*, 353 U.S. at 114; the right-of-way was granted for railroad purposes and extraction of minerals is not a railroad purpose, *id.*; the policy of the times to reserve mineral lands even when not specifically excepted, *id.* at 115-116; the rule that land grants are construed favorably to the Government, *id.* at 116; and the lack of a procedure for determining mineral character of the right-of-way and the inappropriateness of such a test to the right-of-way grant, *id.* at 116-118. This Court expressly stated that "these are the reasons we construe" the 1862 Act as reserving all minerals underlying the right-of-way. They are as applicable to the 1864 Act as to the 1862 Act. Therefore, if construction of the 1864 Act was an open question, its construction by the Court of Appeals is not in accord with the considerations of principle and policy which should have guided its decision.

The decision of the Court of Appeals, as well as of the Secretary, also appears to be inconsistent with this Court's decision in *Great Northern* and with the current regulation which the Secretary issued in consequence of that decision. In that case, it appeared upon the oral argument that the record did not show that the United States owned the tracts traversed by the railroad right-of-way. This Court

said "On this state of the record, the United States was not entitled to any judgment below." But it permitted this defect to be cured by stipulation filed after the oral argument, and the judgment for the United States was expressly limited to the six tracts covered by the stipulation. 315 U.S. at 279-280. Following that decision, the Secretary issued the following regulation:

> "The Government conveys the fee simple title in the land over which the right-of-way is granted to the person to whom patent issues for the legal subdivision on which the right-of-way is located, and such patentee takes the fee subject only to the railroad company's right of use and possession." 19 F.R. 9098, Dec. 23, 1954, 43 CFR § 2234.2-2(b).

This is the same as the early regulation of May 11, 1909, 37 L.D. 788, which this Court cited in *Great Northern.* It is true that post-1871 railroad rights-of-ways, granted under the General Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939, are the subject of both the regulation and the decision in *Great Northern.* But this Court held in *Union Pacific* that the change of Congressional policy which occurred in 1871 of no longer granting land in fee in aid of railroad construction afforded no basis for distinguishing between the pre- and post-1871 right-of-way grants. 350 U.S. at 119. It held that *Northern Pacific Railway Company* v. *Townsend,* 190 U.S. 267, and other earlier limited fee decisions did no more than hold that under pre-1871 right-of-way grants the railroads acquired the exclusive use and possession of the surface for railroad purposes only. They acquire the same right under post-1871 grants. *Great Northern,* 315 U.S. at 272. Accordingly, the Secretary erred in basing his decision on the

fact that *Union Pacific* only distinguished, and did not overrule, *Townsend,* and did not call the right-of-way an easement. Since the dominant estates granted to the railroads do not differ, the rights of the grantees and patentees of the encumbered tracts should be the same. The distinction which both the Court of Appeals and the Secretary have drawn is an incongruity in the public land law of the nation which is inconsistent with this Court's rejection of any distinction in *Union Pacific.*

The question here presented is an important one, since the interests of not less than seventeen States, as well as countless individuals, will be affected, if not actually determined by the decision of this case. This will appear from App. B to this petition, *infra,* pp. xli-xliv, which shows the approximate length and location of the railroad rights-of-way which were constructed pursuant to Acts of Congress enacted between 1862 and 1871, when the policy prevailed of granting lands in fee in aid of construction of the road in addition to rights-of-way across the public domain.[1] It shows that over 3,000 miles of railroad lying in eight States (Iowa, Kansas, Nebraska, Colorado, Wyoming, Utah, Nevada and California) were constructed pursuant to the Act here in question. An additional 4,400 miles lying in nine other States (Minnesota, North Dakota, Montana, Idaho, Washington, Oregon, New Mexico, Arizona and Louisiana) were constructed by other railroad companies pursuant to five other grants which are similar to Union

[1] This appendix is a reproduction of App. B to the Government's petition for certiorari in *Union Pacific,* except that we have added the asterisks to show the grants which, like the one here in question, contain a removal of coal and iron land from the mineral lands exception to the place land grant.

Pacific's in that they grant the right-of-way in practically identical language and grant land in fee in aid of construction of the railroad subject to the exception of "mineral lands" but excluding "coal and iron lands" from the exception. These rights-of-way form a vast network which crisscross the western half of the nation. In addition, the school land grants to most, if not all, of the States in which these rights-of-way lie contain the same exception of "previously disposed of land" as is found in Wyoming's school land grant, *e.g.*, Kansas, Act of July 29, 1861, 12 Stat. 127; North Dakota, South Dakota, Montana and Washington, Act of February 22, 1889, 25 Stat. 679; Utah, Act of July 16, 1894, 28 Stat. 107; Colorado, Act of March 3, 1874, 18 Stat. 474.

Therefore, this case does not turn, nor do the claims of the United States and Wyoming depend, upon any special or unique term or condition of either Wyoming's grant or Union Pacific's grant. It would seem to follow that decision here will in practical effect determine the rights of all of the States and individuals to whom the United States has granted or patented tracts crossed by the rights-of-way of these land grant railroads.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Wyoming 0105263
May 1, 1962

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DECISION

Gulf Oil Corporation Union Pacific Railroad Company	:	Oil and Gas

Decision Vacated

This is an appeal by the Gulf Oil Corporation from a decision of the Chief, Minerals Section, Cheyenne Land Office, dated December 29, 1960, inviting bids from the owner of the right-of-way grant (Union Pacific Railroad Company) and the owner of an oil and gas lease of State lands adjoining the right-of-way (Gulf Oil Corporation) as to the amount or percentage of compensatory royalty each will agree to pay under the provisions of the Act of May 21, 1930 (30 U.S.C. 301-306) 43 CFR 200.80-200.87. The right-of-way lies in the E½ and the SW¼ sec. 36, T. 19 N., R. 99 W., 6th P.M., Wyoming. Only the Union Pacific Railroad Company has offered to pay a royalty of 12½ per cent covering portions of its right-of-way in sec. 36.

Gulf Oil Corporation contends that the United States has no interest or title in the minerals within the right-of-way and that the minerals thereunder are vested in the State of Wyoming.

[APPENDIX]

The survey of T. 19 N., R. 99 W., 6th P.M., was approved December 20, 1884 and the center line of the Union Pacific Railroad is shown on that plat. The Land Department uniformly has ruled that the States acquire vested rights in all school sections in place which are not otherwise appropriated and not known to be mineral at the time of survey, or at the date of the grant where the survey precedes it (*Wyoming* v. *United States*, 255 U.S. 489-500). The title of the State to the land in sec. 36 was acquired under the act of July 10, 1890 (26 Stat. 222) providing for the admission of the State into the Union, and its rights became vested upon the date of admission of the State under said act, if the land was not then known to be mineral in character.[1]

The record reveals that the NE¼, NE¼SW¼, SW¼SW¼ and NE¼ SE¼, above section, township and range, were reconveyed by the State to the United States under sec. 8 of the Act of June 28, 1934 (48 Stat. 1269) as amended June 26, 1936 (49 Stat. 1796) with a reservation of all minerals to the grantor. The deed of conveyance was executed April 15, 1950. Title was accepted by the United States January 8, 1952 and patent number 1135234 issued on May 21, 1952.

The sole question presented by this appeal is: Are mineral rights within the right-of-way in sec. 36 vested in the United States or the State of Wyoming? The answer may be found in a determination of the type of estate conveyed by the United States to the Union Pacific Railroad by the right-of-way grant of 1862.

Interpretations of recent pertinent decisions of the United States Supreme Court concerning the nature of the vested interest in rights-of-way granted under the Act of 1862 are found in *Solicitor's Opinion* M-36597 (June 3, 1960). Therein it was stated that the case of *United States* v. *Union*

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[1] Nothing in the records indicates that on July 10, 1890, the lands in sec. 36 were known to be mineral in character.

Pacific Railroad Company, 353 U.S. 112 (1957) indicated that most railroad rights-of-way grants were deemed to be limited fees, conveying for the life of the fee, full title, in the land and minerals even though, because of the express limitations on the right of users, the right-of-way owner could not mine and remove any minerals from the granted lands. It was also pointed out that the limited fee doctrine was narrowed considerably by *Great Northern Railway Company* v. *United States*, 315 U.S. 262 (1942), which limited its application as to railroad rights-of-way to those made to the so-called land grant railroads prior to the year 1871. The Solicitor declared that the final blow was dealt to the limited fee doctrine so far as it applied to minerals in right-of-way by *United States* v. *Union Pacific Railroad Company, supra*, wherein it was held that the land right-of-way grant there under consideration (Act of July 1, 1862; 12 Stat. 489), did not convey the minerals in the right-of-way, but, whatever the nature of the grant, it related only to "all surface rights to the right-of-way and all rights incident to a use for railroad purposes."[2] Cf. H. S. Davis, et al., A-27758, etc. (January 30, 1959).

In view of the above, it must be considered that the grant of the right-of-way to the Union Pacific Railroad in 1862, conveyed only the right to use the surface of the land for railroad purposes and that the United States retained the title to sec. 36 subject only to the use by the railroad. It logically follows that upon the admission of the State of Wyoming into the Union it was vested with whatever rights

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[2] In grants of "right-of-way" over public lands to the railroads, the quoted phrase means the right to use the grant of right-of-way for the purpose of constructing, maintaining, and operating a railroad thereon, and property rights of a railroad thereunder extend upward for a space necessary for the use of its franchise and downward to a line of support for its tracks and superstructure. *United States* v. *Great Northern Railway* D. C. Mont. 32 F. Supp. 651 affirmed CCA *Mac Donald* v. *United States* 119 F.2nd 821, modified on other grounds 62 S. Ct. 529, 315 U. S. 262.

the United States possessed at that time. The United States not having been divested of its mineral rights, the full title to the lands (surface and subsurface) passed to the State upon its admission on July 10, 1890 subject only to the right-of-way to the Union Pacific Railroad.

In view of the foregoing, the Land Office decision requiring compensatory royalty bids was improper and is hereby vacated.

The Union Pacific Railroad is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken then the adverse party to be served is:

Gulf Oil Corporation
Box 661
Tulsa 2, Oklahoma

s/ Dale E. Zimmerman
Chief, Branch of Mineral
Leasing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:

Union Pacific Railroad (Regular Mail)
F. J. Melia and James H. Anderson, Attorney at Law (Certified Mail)
Gulf Oil Corporation (Regular Mail)
A. G. McClintock, Attorney at Law (Regular Mail)
Booth Kellough, Attorney at Law (Regular Mail)
Roger K. Allen, Attorney at Law (Regular Mail)

Conservation Division, Geological Survey (3)
SD (Wyoming)
LO. (Cheyenne)
Chief, Division of Minerals
Case File
Perm. File
Attorneys' Reading File
Appeals Reading File
JBJ

In reply refer to:
6.05c
Wyoming 085043

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 12, 1962

Certified Mail
Return Receipt Requested

DECISION

Gulf Oil Corporation : Oil and Gas

Decision Reversed

Gulf Oil Corporation has appealed from the decision of the Chief, Mineral Adjudication Section, Cheyenne Land Office, dated September 7, 1960. The appeal is directed solely to the N½, SW¼ Sec. 16, T. 18N., R. 99 W., 6th P.M., Wyoming, lying within the right-of-way and station grounds of the Union Pacific Railroad Company. The decision in-

vited bids covering these lands from the owner of the right-of-way grant (Union Pacific Railroad Company) and the holders of the oil and gas leases on adjoining State lands, pursuant to the Act of May 21, 1930 (30 U.S.C., 1958 ed., secs. 301-306) and regulations thereunder, 43 CFR 200.80-200.87.

Gulf Oil Corporation, the lessee of an oil and gas lease from the State of Wyoming on the lands adjacent to the right-of-way, contends that the United States has no interest or title in the minerals in the involved lands within the right of way and that the minerals thereunder have vested in the State of Wyoming. Union Pacific Railroad Company, the owner of the right-of-way entered its appearance and refutes the position of the Gulf Oil Corporation, stating that the United States has the full right, title and interest in and to all of the minerals underlying the subject lands and are leaseable under the Act of May 21, 1930.

The survey of T. 18 N. R. 99 W., 6th P.M. Wyoming was approved September 8, 1877 and the center line of the Union Pacific Railroad is shown on that plat. The title to the land in section 16 vested in the State of Wyoming on its admission to the Union under the Act of July 10, 1890 (26 Stat. 222), if the land was not then known to be mineral in character.[1] Cf. *Wyoming* v. *United States,* 255 U.S. 489-500). The record reveals all of section 16 was reconveyed by the State to the United States under section 8 of the Act of June 28, 1934 (48 Stat. 1269), as amended, with a reservation of all minerals to the grantor by deed executed May 31, 1938. In a similar case, *Gulf Oil Corporation et al,* Wyoming 0105263 (May 1, 1962), this office held that the grant of the right-of-way to the railroad conveyed only the right to use the surface of the land for railroad purposes and that the United States retained the title thereto subject only to such

[1] Nothing in the records indicates that on July 10, 1890, the lands in section 16 were known to be mineral in character.

use by the railroad and upon admission of the State of Wyoming into the Union it was vested with whatever rights the United States possessed at that time. The United States not having been divested of its mineral rights, the full title to the lands (surface and subsurface) passed to the State upon its admission to the Union subject only to the right-of-way to the railroad.

In view thereof, the land office decision including said lands in the invitation for bidding under said act was improper and it is hereby reversed.

When this decision becomes final the case will be remanded to the Land Office through the Bureau's State Director, Cheyenne, Wyoming for further appropriate action consistent with this decision.

The Union Pacific Railroad Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken then the adverse party to be served is;

Gulf Oil Corporation
Box 661
Tulsa 2, Oklahoma

s/ John B. Piccolo
Acting Chief
Division of Appeals

Enclosure

DISTRIBUTION:

Union Pacific Railroad Company c/o James H. Anderson (Certified Mail)

Gulf Oil Corporation (Regular Mail)

[APPENDIX]

A. G. McClintock (Regular Mail)
Division of Minerals (3)
Geological Survey
SD (Wyoming)
LO (Cheyenne)
Case File
Perm. File
Attorney's Reading File
Appeals Reading File
WJ

UNION PACIFIC RAILROAD COMPANY

A-29607
A-29686 *Decided FEB 16 1965*

Oil and Gas—Railroad Grant Lands—Rights-of-way: Nature of Interest Granted—School Lands: Mineral Lands

The Secretary of the Interior has authority under the act of May 21, 1930, to dispose of deposits of oil and gas underlying the right-of-way granted to the Union Pacific Railroad Company pursuant to the acts of July 1, 1862, and July 2, 1864, even though the lands traversed by the right-of-way were later granted to a State as school lands.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D. C., 20240

A-29607
A-29686

Union Pacific Railroad Company	:	Wyoming 0105263, 085043
	:	Invitation for royalty
	:	bids on oil and gas
	:	rejected
	:	Reversed and remanded

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Union Pacific Railroad Company has appealed to the Secretary of the Interior from decisions dated May 1 and June 12, 1962, by which the Division of Appeals of the Bureau of Land Management vacated one decision and reversed another of the land office at Cheyenne, Wyoming, inviting bids on royalty or compensatory royalty to be paid on production of oil and gas from railroad right-of-way land within the E½ and the SW¼ sec. 36, T. 19N., R. 99 W., and, among other lands, the N½ and the SW¼ sec. 16, T. 18N., R. 99 W., 6th P.M., Wyoming. The decisions of the Division of Appeals were based on the ground that the mineral estate in the right-of-way land is vested in the State of Wyoming by reason of the State's acquisition of other land in sections 36 and 16 not included in the right-of-way.

The land in section 36 was included in a plat of survey approved December 20, 1884, and the land in section 16 in a plat of survey approved September 8, 1877, both plats showing the center line of the proposed railroad to be built by the Union Pacific Railroad Company pursuant to the acts of July 1, 1862, 12 Stat. 489, and July 2, 1864, 13 Stat. 356.

Thereafter, on July 10, 1890, the Territory of Wyoming achieved statehood, 26 Stat. 222, at a time when the land in the sections was not known to be mineral in character. Under the terms of the Statehood Act, the State took title to sections 16 and 36 in each township within the State as school sections. By deed dated April 15, 1950, the State of Wyoming conveyed to the United States the NE¼, NE¼ SW¼, SW¼SW¼, and NE¼SE¼ of section 36, reserving, however, all minerals to the State. By deed dated May 31, 1938, the State conveyed to the United States all of section 16 with a reservation of all minerals. On October 2, 1952, the State of Wyoming leased all of sections 16 and 36 for the removal of oil and gas to Raymond Chorney who assigned his lease to Gulf Oil Corporation. It appears that the lease made no mention of the Union Pacific right-of-way traversing the school sections and the acreages indicated are those of the full sections less exceptions not material here.

In 1954, the United States brought an action in the Federal district court for Wyoming seeking to enjoin the Union Pacific Railroad Company from using its right-of-way for the purpose of removing gas, oil, and other minerals and asking that title to minerals underlying the right-of-way be quieted in the United States. This litigation terminated in a decision of the United States Supreme Court holding that under the language of the granting act of July 1, 1862, *supra*, which excepts mineral lands, the grant of the right-of-way excepted the mineral interest. *United States* v. *Union Pacific R.R.*, 353 U.S. 112 (1957). In response to the subsequent request of the Union Pacific Railroad Company, proffered after the establishment of oil production in the Patrick Draw Field within which sections 36 and 16 are located, the land office in Cheyenne issued two separate invitations to the Union Pacific Railroad Company, as owner of the right-of-way, and Gulf Oil Corporation, as lessee of land adjoining the right-of-way, for bids on the amount or percentage of royalty to be paid on oil and gas

production from the right-of-way in the event of an award of a lease to Union Pacific on the right-of-way land and on the amount or percentage of compensatory royalty to be paid by Gulf for extraction of oil and gas under the right-of-way from wells on the adjoining land under the act of May 21, 1930, 46 Stat. 373, 30 U.S.C. §§ 301-306 (1958).

Union Pacific submitted a bid in the amount of the minimum royalty acceptable but Gulf appealed, asserting that the United States has no right, title, or interest in the minerals within the right-of-way because such minerals were vested in the State of Wyoming at the time of its admission to the Union. It contended that by the Statehood Act every incident of a fee simple title to the school sections held by the United States on July 10, 1890, vested in the State of Wyoming, that because the Supreme Court held in 1957 that Union Pacific has no estate in minerals underlying the right-of-way[1] and it is undisputed that sections 16 and 36 were surveyed and not known to be mineral on July 10, 1890, the minerals underlying the right-of-way passed to the State by virtue of the school grant in the Statehood Act. It asserted that the Department of the Interior cannot conclusively adjudicate the title of the State of Wyoming to the minerals but, nevertheless, requested that the Department disclaim all right, title, interest, claim, or demand to the minerals, including oil and gas, in the right-of-way land.

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[1] This litigation did not relate to coal and iron and the judgment entered pursuant to the decision of the Supreme Court declares expressly that it does not purport to determine the rights of the parties with respect to the ownership of or right to remove coal and iron deposits in and from the right-of-way and is without prejudice, as far as issues relating to coal and iron deposits are concerned, to the rights of either party. This reflects the language of section 4 of the act of July 2, 1864, *supra*, which expressly excludes coal and iron land from the term "mineral land" as used in the act. Subsequent references in this decision to minerals are to be read with this qualification as to coal and iron.

The Division of Appeals agreed that upon the admission of the State of Wyoming the State was vested with whatever rights in sections 16 and 36 the United States possessed at that time and that, since the United States had not divested itself of mineral rights in the right-of-way land, full title, both surface and subsurface, to sections 16 and 36 passed to the State subject only to the right-of-way held by Union Pacific.

In its appeal to the Secretary, Union Pacific contends that the United States has the full right, title, and interest in minerals underlying the right-of-way and thus has full authority to call for royalty bids and to issue leases. It predicates this conclusion upon the contentions that the Supreme Court did not hold in *United States* v. *Union Pacific R.R., supra,* that Union Pacific has only an easement of the same nature as the grants of rights-of-way under the act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1958), and that there is no precedent for the assumption of the Division of Appeals that it follows as a matter of course that minerals in right-of-way land pass to the patentee or grantee of land traversed by the right-of-way.

The question thus presented by this appeal is whether the Secretary of the Interior has authority to dispose of oil and gas deposits in the Union Pacific right-of-way under the act of May 21, 1930, *supra,* as property of the United States, or whether the Secretary lacks such authority because the minerals retained by the United States under the railroad grant subsequently passed to the State of Wyoming under the school grant to the State of the legal subdivisions traversed by the right-of-way.

Until the 1957 decision in *United States* v. *Union Pacific R.R., supra,* the appeal would have presented no novel problem. The nature of a railroad's interest in its right-of-way had been the subject of extended consideration in cases which set out all the principles pertinent to the dis-

position of this conflict. It seemed settled that the railroad right-of-way acts gave the railroads a limited fee in their rights-of-way subject to a possibility of reverter to the United States; that neither the railroads under the grants of the rights-of-way nor the railroads, the States, or other grantees of the lands through which the railroad rights-of-way passed received the rights to exploit the oil and gas underlying the rights-of-way; and that the United States alone could dispose of the oil and gas and then only pursuant to the act of May 21, 1930, *supra. A. Otis Birch and M. Estelle C. Birch (On Rehearing),* 53 I.D. 340 (1931); *State of Wyoming,* 58 I.D. 128 (1942); Solicitor's opinion, 58 I.D. 160 (1942); *Phillips Petroleum Company,* 61 I.D. 93 (1953), and cases cited therein.

It is true that in *Great Northern Ry.* v. *United States,* 315 U.S. 262 (1942), the Court held that rights-of-way granted under the act of March 3, 1875, supra, are easements only, not fees, and confer no right in a railroad to oil and other minerals underlying the right-of-way and that the United States was entitled to an injunction enjoining the railroad from using the right-of-way for the purpose of drilling for or removing oil and gas underlying the right-of-way insofar as it passed through tracts owned by the United States. The Department, however, held that that decision did not change the rights of a State to minerals underlying the Union Pacific right-of-way granted by the 1862 act in lands which had passed to the State under its school land grant. *State of Wyoming, supra.*

In *United States* v. *Union Pacific R.R., supra,* the Court held that the United States was entitled to an injunction enjoining the railroad from drilling for oil and gas on the "right-of-way" granted to it by the acts of 1862 and 1864, *supra.* It held, contrary to the conclusions of the courts below, that in view of the exclusion of mineral lands from the grant to the railroad and the public policy of the times the grant did not include mineral rights. In disposing of

the railroad's claim, it pointed out that, even though a right-of-way may at times be more than an easement, it did not follow in such a case that the owner of the right-of-way was given the mineral rights as against the United States. The dissent would have affirmed the decisions below holding that the grant of the right-of-way included the minerals.

The *Union Pacific* case has settled the conflict between the railroad and the United States over the rights to subsurface oil and gas and other minerals in favor of the United States. This appeal raises anew the issue of whether these rights remain in the United States or pass to the subsequent patentee or grantee of lands traversed by the railroad.

As we have seen, when the limited fee concept reigned unchallenged, the Department and the courts held repeatedly that a subsequent grantee or patentee of such lands took no right whatsoever in the right-of-way. The Supreme Court in *Northern Pacific Ry.* v. *Townsend,* 190 U.S. 267, 270, said:

> "At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to preemption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions."

While this reasoning no longer applies to lands crossed by a right-of-way granted under the 1875 act, *supra,* and the Department recognizes in such cases that mineral rights go to the subsequent patentee subject to the dominant rights

of the railroad right-of-way[2], the *Union Pacific* case, *supra*, did not hold that a pre-1875 right-of-way had no more effect than one granted under the 1875 act.

On the contrary, a comparison of the *Great Northern* decision and the *Union Pacific* decision demonstrates that the *Union Pacific* case left unaltered the rule that a right-of-way obtained under the 1862 and 1864 acts, *supra*, separated the land from the public domain and that subsequent grantees of lands traversed by the right-of-way gained no rights in it.

In *Great Northern Ry., supra*, the Supreme Court required the United States to show that it had retained title to certain tracts of land through which the right-of-way passed and limited its judgment to those tracts. 315 U.S. 262, 279-280 (1942).

The *Union Pacific* opinion, however, is devoid of any reference to a requirement that the United States own any land crossed by the right-of-way as a prerequisite to a judgment in its favor. This omission is particularly striking because the case was tried on stipulated facts, one of which was that the title to the minerals in the particular tract, the subject of the litigation, the E½NW¼ sec. 24, T. 13 N., R. 68 W., 6th P.M., Wyoming, which was crossed by the right-of-way, was in the United States. Yet, despite this limitation, the judgment of the district court, upon the judgment and mandate of the Supreme Court, enjoined the railroad from drilling for or removing oil and gas and other minerals in and underlying "the right-of-way granted * * * pursuant to the Act of July 1, 1862," and quieted the title of the United States to the oil, gas and other minerals in and underlying "said right-of-way." The judgment was thus in terms applicable to the entire right-of-way and it has been so construed by the railroad. See appellant's brief, pp. 6-7.

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[2] See: *Northern Pacific Ry.* v. *United States*, 277 F.2d 615 (10th Cir. 1960); *Chicago & Northwestern Ry.* v. *Continental Oil Co.*, 253 F.2d 468 (10th Cir. 1958).

That the Supreme Court did not intend to change the settled law governing the rights of subsequent grantees or patentees of lands traversed by the right-of-way seems apparent from its discussion of *Northern Pacific Ry.* v. *Townsend, supra.* There it was held that a subsequent homestead entry could not be established on the railroad right-of-way after the right-of-way had been located and the tracks laid, and that the railroad had in effect been granted a limited fee subject to an implied condition of reverter. While in *Union Pacific* the Court held that the *Townsend* case did not settle the question of ownership of the underlying minerals between the railroad and the United States, it did not say that the *Townsend* and other "limited fee" cases involving pre-1875 rights-of-way were wrong, a conclusion that would have enabled it to dispose of the major issue under the holding in the *Great Northern Ry.* case, *supra.* Having held that, under the granting act and the general policy of Congress, it could not conclude that the railroad had been given the mineral rights, the Court said only:

> "* * * The most that the 'limited fee' cases decided was that the railroads received all surface rights to the right of way and all rights incident to a use for railroad purposes." 353 U.S. at 119.

It did not hold that the railroad had only an easement.

As we have noted, the Court pointed out that the limited fee cases involved conflicts between the railroad and third persons. Here the United States, having established its rights to the underlying minerals vis-a-vis the railroad, stands in its stead against the subsequent patentee or grantee.

Just as the Court held in *Townsend, supra,* that a subsequent homesteader cannot acquire rights against the railroad, so here the State, a subsequent grantee, can acquire no rights against the United States which holds all the interest in the right-of-way not held by the railroad.

Whatever the exact nature of the estate created by the 1862 and 1864 acts may be, it is clear that it is more than an easement and sufficient to take the lands covered by the right-of-way out of the category of public lands subject to further disposition to the State.[3]

The Solicitor's opinion, 67 I.D. 225 (1962), on which the decision below relied, is not to the contrary. It merely held that leaseable minerals other than oil and gas underlying rights-of-way could be disposed of pursuant to the Mineral Leasing Act, 41 Stat. 437, as amended, 30 U.S.C. § 181 *et seq.* (1958), whether the right-of-way be construed as an easement or a "limited fee." It did not conclude that minerals underlying the "limited fee" rights-of-way passed with a patent of the lands crossed by such a right-of-way.

Gulf places great reliance upon the departmental decision in *Abilene Oil Company* v. *Choctaw, Oklahoma & Gulf Railroad Company*, 54 I.D. 392 (1934), which held that a grant by the United States conveying a quarter section of public land over which a railroad right-of-way had previously been granted under the act of February 18, 1888, 25 Stat. 35, carried with it, in the absence of further exception or reservation, the entire interest left in the United States, so that the United States no longer had an interest in the oil and gas deposits under the right-of-way which it could lease under the act of May 21, 1930, *supra*. While the decision referred to prior departmental decisions holding that the grantee of lands crossed by a railroad right-of-way had no right to the minerals under it, it did not purport to

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[3] That Congress assumed that no interest in the railroad right-of-way passed to a subsequent grantee or patentee is evident from the several statutes it enacted granting to such persons the lands in the rights-of-way upon forfeiture or abandonment by the railroad. Act of June 26, 1906, 34 Stat. 482; act of February 25, 1909, 35 Stat. 647, 43 U.S.C. §940 (1958); act of March 8, 1922, 42 Stat. 414, 43 U.S.C. §912 (1958).

overrule them, but found that in this instance Congress had intended to dispose of all of the interest of the United States in the right-of-way, including the possibility of reverter, and concluded that the United States had no interest in the right-of-way at all. Since it left intact prior rulings on the effect of a railroad right-of-way on subsequent patents of the lands crossed by the right-of-way and was not followed or even cited in later departmental considerations of the specific problems involved in this appeal (*State of Wyoming, supra*) Solicitor's opinion, 58 I.D. 160, *supra*), it cannot be considered to have been intended as a departure from the uniform view of the courts and the Department that the mineral rights under the Union Pacific railroad right-of-way remained in the United States. It stands, rather, solely as an interpretation of the particular limited statute there under consideration.

Accordingly, it is concluded the *Union Pacific* case did not change the previously established law that only the United States had the rights to minerals underlying pre-1875 act rights-of-way, that the oil and gas deposits underlying the Union Pacific's right-of-way are in the United States, and that the land office properly sought to dispose of them pursuant to the act of May 21, 1930, supra.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a) 24 F.R. 1348), the decisions of the Bureau of Land Management dated May 1 and June 12, 1962, are reversed and the cases remanded for further proceedings consistent herewith.

/s/ FRANK J. BARRY
Solicitor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING.

THE STATE OF WYOMING and GULF OIL CORPORATION, a corporation, Plaintiffs,	)	
vs.	)	
STEWART L. UDALL, individually and as Secretary of the Interior; ED PIERSON, individually and as Supervisor for the State of Wyoming, Bureau of Land Management, Department of the Interior; and DAVID B. MORGAN, Acting Manager, Oil & Gas, Cheyenne, Wyoming Land Office, Bureau of Land Management, Department of the Interior, Defendants.	)	No. 4913 Civil.
UNION PACIFIC RAILROAD COMPANY, a corporation, Intervenor.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having come on regularly before the Court, John F. Raper, Attorney General of the State of Wyoming, and Dean Borthwick, Deputy Attorney General, appearing as counsel for the State of Wyoming, and A. G. McClintock and Roger Allen appearing as counsel for plaintiff Gulf Oil Corporation, Robert N. Chaffin, United States Attorney for Wyoming, and Thomas L. McKevitt, Attorney, Department of Justice, Washington, D. C., appearing as counsel for defendants, and F. J. Melia, J. H. Anderson, B. T. Lazear and Frederick G. Loomis appearing as counsel for Union Pacific Railroad Company, Intervenor, the Court heard the arguments of counsel; and having taken

the matter under advisement, carefully examined the record on file herein, including the Stipulation of Facts to which all the parties agreed, and their exhibits on file herein, and the memorandum briefs submitted by all counsel, and being fully advised in the premises, the Court does hereby make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

1. This is a civil action in which plaintiffs seek a judicial review of the order and ruling of the Secretary of Interior acting through his authorized delegate, the Solicitor, in decision of the Solicitor dated February 16, 1965 (72 I.D. 76), in Wyoming 0105263 and 085043, and a declaration that said order and ruling are null and void; and plaintiffs seek also a declaratory judgment that the State of Wyoming is the owner of all the oil and gas underlying the right of way of Union Pacific Railroad Company in Section 16, Township 18 North, and Section 36, Township 19 North, Range 99 West, 6th P.M., Wyoming, and a declaratory judgment that the Secretary of Interior, acting through his authorized delegate, the Assistant Manager, Oil & Gas, of the Cheyenne, Wyoming Office of the Bureau of Land Management, had and have no power or authority to issue oil and gas leases covering the oil and gas underlying such right of way pursuant to the Act of May 21, 1930 (46 Stat. 373, 30 U.S.C. 301-306), or any other federal act. Plaintiffs seek also an order enjoining Stewart L. Udall, the Secretary of the Interior, Ed Pierson, Supervisor for the State of Wyoming, Bureau of Land Management, and David B. Morgan, Assistant Manager, Oil and Gas, Cheyenne, Wyoming Office of the Bureau of Land Management, from taking any further action to invite, receive, or act upon bids under the Act of May 21, 1930, or any other federal act, for the issuance of oil and gas leases covering the oil and gas underlying such right of way.

2. Gulf Oil Corporation, hereinafter referred to as Gulf, is a corporation duly organized and existing under the laws of the State of Pennsylvania. Its principal office is in the city of Pittsburgh, Pennsylvania. It has and is now qualified to do business in the State of Wyoming.

3. Defendant Stewart L. Udall is a resident of the District of Columbia and is the duly appointed, qualified and acting Secretary of the Interior of the United States of America. Defendants Ed Pierson and David B. Morgan, hereinafter referred to as Pierson and Morgan, are each citizens of the State of Wyoming, Pierson being the duly appointed, qualified and acting Supervisor and Morgan being the duly appointed, qualified and acting Assistant Manager, Oil and Gas, of the Cheyenne, Wyoming Land Office of the Bureau of Land Management, Department of the Interior.

4. Intervenor, Union Pacific Railroad Company, hereinafter referred to as Union Pacific, is a corporation organized and existing under the laws of the State of Utah. Its principal place of business is in the city of Omaha, Nebraska. It has qualified to do business in the State of Wyoming, and is now engaged in the ownership and operation of a railroad in Wyoming which traverses the land involved in this action.

5. The question involved herein is whether the Secretary of the Interior has authority to dispose of oil and gas deposits in the Union Pacific right of way under the Act of May 21, 1930, (46 Stat. 373), as property of the United States, or whether the Secretary lacks such authority because the minerals retained by the United States under the railroad grant subsequently passed to the State of Wyoming under the Act of July 10, 1890 (26 Stat. 222), granting school land to the State. Exclusive of interest and costs, the value of oil and gas rights underlying the land in question is in excess of Ten Thousand Dollars ($10,000.00).

6. By the Act of July 1, 1862 (12 Stat. 489), as amended by the Act of July 2, 1864 (13 Stat. 356), the United States granted to a predecessor in title of the Union Pacific a right of way 400 feet in width through the public lands of the United States for the construction of a railroad and telegraph line. Union Pacific succeeded to the rights of the original grantee under said Acts and it and its predecessors have complied in all respects with the provisions of the said Acts, and a predecessor of Union Pacific constructed a railroad and telegraph line on said right of way. Union Pacific, or a predecessor thereof, is now and has been at all times pertinent hereto using the right of way for the purposes set forth in said Acts. No portion of the right of way involved in this action has been abandoned.

7. The survey of Township 18 North, Range 99 West, 6th P. M., duly approved by the Surveyor General, was filed in the Cheyenne Land Office effective as of September 8, 1877, and the survey of Township 19 North, Range 99 West, 6th P. M., duly approved by the Surveyor General, was filed in the Cheyenne Land Office effective as of December 20, 1884, and each purports to show the center line of Union Pacific's railroad as actually constructed by a predecessor under the Acts of July 1, 1862, and July 2, 1864, prior to 1877 but no earlier than 1868, traversing a part of Sections 16 and 36 involved herein. At the time of approval of the surveys referred to above and upon adoption of the Act of July 10, 1890 (26 Stat. 222), admitting the Territory of Wyoming to Statehood, Sections 16 and 36 involved herein were not known to be mineral in character.

8. By the Act of July 10, 1890 (26 Stat. 222), the United States granted to the State of Wyoming sections numbered 16 and 36 in every township of Wyoming for the support of the common schools, or equivalent lands in lieu thereof where Sections 16 and 36 or any parts thereof had been sold or otherwise disposed of by or under the authority of any Act of Congress. All mineral lands were

exempted from said grants, and the state was authorized to select unappropriated lands in lieu of any sections 16 or 36 or parts thereof found by the Department of the Interior to be mineral lands.

9. No in lieu selection pursuant to Section 4 of the Act of July 10, 1890, and Section 2275 of the Revised Statutes 43 U.S.C. 851) has ever been made by the State of Wyoming for land equivalent to the land occupied by Union Pacific as its right of way under the foregoing Acts.

10. The State of Wyoming executed and delivered to the United States a deed dated May 31, 1938, covering all of Section 16, and a deed dated April 15, 1950, covering the NE¼, NE¼SW¼, SW¼SW¼, and NE¼SE¼ of Section 36, reserving however to the State of Wyoming, its successors and assigns, all minerals, including coal, oil and gas, and any mineral of any other character and mineral rights in and to said premises and the right of ingress and egress to said premises and the use of so much of the surface thereof as may be necessary to prospect for, develop and remove such minerals, or any part thereof.

11. The State of Wyoming, acting by and through its duly authorized Board of Land Commissioners, issued oil and gas lease bearing Serial No. 0-13548, under date of October 2, 1952, to Raymond Chorney, which lease described all of Section 36, Township 19 North, Range 99 West, 6th P. M., except 14.7 acres conveyed to Union Pacific as aforesaid. By Assignment dated June 24, 1953, Raymond Chorney assigned such leasehold estate to Gulf, who now holds the same.

12. The oil and gas lease issued by the State of Wyoming under Serial 0-13547 under date of October 2, 1952, describing, among other lands, all of Section 16, Township 18 North, Range 99 West, 6th P.M., was subsequently assigned to Gulf, and has expired since the initiation of the proceedings hereinafter referred to. Gulf does not now

assert any right, title or interest in and to the oil, gas or kindred hydrocarbons under any portion of said Section 16.

13. By application dated March 24, 1960, Union Pacific, pursuant to the Act of May 21, 1930 (46 Stat. 373), applied to the Manager, Cheyenne Land Office, Bureau of Land Management, for an oil and gas lease covering, among other land, the railroad right of way lands in Section 16 and by like application dated May 3, 1960, applied for a lease covering Section 36. Said applications resulted in the decisions of the Land Office dated September 7, 1960, and December 29, 1960, inviting royalty bids from Union Pacific as the owner of the right of way and compensatory royalty bids from Gulf as the owner of the oil and gas leases adjoining the right of way within Sections 16 and 36.

14. Gulf appealed the foregoing decisions of September 7, 1960 and December 29, 1960 to the Director, Bureau of Land Management. By decisions dated May 1 and June 12, 1962 (Wyoming 0105263 and 085043), the Director held that whatever rights the United States possessed in the rights of way in question vested in the State of Wyoming upon its admission to the Union and accordingly held the invitations to bid to have been improper and reversed and remanded each of the decisions. Union Pacific appealed each of the decisions of the Director to the Secretary of the Interior, who consolidated the same. By Solicitor's opinion dated February 16, 1965 (72 I.D. 76), entered in the consolidated cases, the Director's decisions were reversed and it was held that title to oil and gas deposits underlying Union Pacific's right of way was vested in the United States and the cases were remanded for further proceedings consistent with such ownership by the United States. The State of Wyoming was not a party to any of the foregoing proceedings in the Department of the Interior. Plaintiff Gulf has exhausted all of its administrative remedies with respect to the issues involved in the Solicitor's Opinion dated February 16, 1965.

15. Plaintiffs instituted this action on May 17, 1965, and thereafter on May 26, 1965, defendant Morgan as Acting Manager, Oil and Gas, Cheyenne Land Office, Bureau of Land Management, issued United States Oil and Gas Lease Serial No. Wyoming 0105263 to Union Pacific, describing its right of way acquired pursuant to the Acts of July 1, 1862 and July 2, 1864 within the E½ and SW¼ of Section 36. Gulf has appealed the decision and action of May 26, 1965, on the ground that the lease issued thereby was issued contrary to the Act of May 21, 1930. Such appeal does not involve and will not further adjudicate, within the Department of the Interior, the question of ownership of oil, gas and other kindred hydrocarbons underlying Union Pacific's right of way.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter of this action brought pursuant to 5 U.S.C. Section 1009, and 28 U.S.C. Section 2201.

2. By the Acts of July 1, 1862, as amended by the Act of July 2, 1864 (12 Stat. 489, 13 Stat. 356), the United States granted to Union Pacific Company's predecessor a right of way through public lands for the construction of the railroad and telegraph line. Said grant did not convey to Union Pacific the title to oil and gas deposits underlying the right of way, the United States reserving all mineral rights under said right of way. United States v. Union Pacific Railroad Co., 353 U.S. 112 (1957).

3. Mineral lands are specifically exempted from the grants made by Section 13 of the Act of July 10, 1890 (26 Stat. 222). The term "mineral lands" as used in that Act must be construed to include the mineral rights in the right of way granted to the Union Pacific by Section 2 of the Act of July 1, 1862, as amended by the Act of July 2, 1864, and therefore all mineral rights under the Union Pacific's right of way are exempted from the grants from the United States to the State of Wyoming.

4. The State of Wyoming, under the Wyoming Statehood Act of July 10, 1890 (26 Stat. 222), did not acquire any interest in and now has no right, title or interest in that strip of land 400 feet in width granted to Union Pacific's predecessor in interest under the Act of July 1, 1862 (12 Stat. 489), as amended by the Act of July 2, 1864 (13 Stat. 356), for a right of way for the construction and operation of a railroad across Section 16, Township 18 North, and Section 36, Township 19 North, Range 99 West of the 6th P. M., Sweetwater County, Wyoming. The Gulf Oil Corporation, as lessee of the State of Wyoming, did not acquire and does not have any right, title or interest in said strip of land or in the oil and gas therein.

5. Title to all oil and gas underlying said strip of land referred to in Paragraph 4 of the Conclusions of Law is in the United States of America.

6. The order and ruling of the defendant the Secretary of the Interior, acting through his authorized delegate, the Solicitor, dated February 16, 1965 (72 I.D. 76), in Wyoming 0105263 and 085043, is not arbitrary or capricious, does not constitute an abuse of discretion, and is not otherwise contrary to law; and said decision is supported by the facts and the law.

7. The Secretary of the Interior has the power and authority to issue oil and gas leases covering the oil and gas underlying such right of way pursuant to the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. §§ 301, et seq.

8. The action of the Cheyenne Land Office pursuant to the Act of May 21, 1930, supra, to lease the oil and gas deposits underlying the said right of way to Union Pacific was in all respects just, true and correct.

9. Judgment should be entered in favor of defendants and in favor of intervenor, Union Pacific Railroad Company, and against the plaintiffs, each party to pay its own costs.

Dated this 30th day of June, 1966.

EWING T. KERR

Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING.

—o—

THE STATE OF WYOMING and GULF OIL CORPORATION, a corporation, Plaintiffs,	)	
vs.	)	
STEWART L. UDALL, individually and as Secretary of the Interior; ED PIERSON, individually and as Supervisor for the State of Wyoming, Bureau of Land Management, Department of the Interior; and DAVID B. MORGAN, Acting Manager, Oil & Gas, Cheyenne, Wyoming Land Office, Bureau of Land Management, Department of the Interior, Defendants.	)	No. 4913 Civil.
UNION PACIFIC RAILROAD COMPANY, a corporation, Intervenor.	)	

JUDGMENT OF DISMISSAL.

The above entitled matter having come on regularly before the Court, and the Court having taken said matter under advisement, and having considered the pleadings and the stipulation of facts, constituting the entire record in the case, and having heard and considered the arguments and briefs of counsel, and the Court having prepared and filed herein its Findings of Fact and Conclusions of Law holding

generally against the plaintiffs and in favor of the defendants and intervenor, and being fully advised in the premises, it is

ORDERED that the plaintiffs take nothing by their complaint and that they go hence without day, and that the complaint, together with the cause, be, and the same is hereby, dismissed with prejudice, each party to pay its own costs.

Dated this 30th day of June, 1966.

EWING T. KERR
Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING.

—o—

THE STATE OF WYOMING and GULF OIL CORPORATION, a corporation, Plaintiffs,	)	
vs.	)	
STEWART L. UDALL, individually and as Secretary of the Interior; ED PIERSON, individually and as Supervisor for the State of Wyoming, Bureau of Land Management, Department of the Interior; and DAVID B. MORGAN, Acting Manager, Oil & Gas, Cheyenne, Wyoming Land Office, Bureau of Land Management, Department of the Interior, Defendants.	)	No. 4913 Civil.
UNION PACIFIC RAILROAD COMPANY, a corporation, Intervenor.	)	

ORDER AMENDING CONCLUSIONS OF LAW.

The above entitled matter having come on regularly before the Court upon the plaintiffs' Motion to amend Paragraph 8 of the Conclusions of Law made and entered herein on the 30th day of June, 1966, and the Court being fully advised in the premises,

IT IS ORDERED that Paragraph 8 of said Conclusions of Law be, and the same is hereby, amended to read as follows:

"8. The action of the Cheyenne Land Office pursuant to the Act of May 21, 1930, supra, to lease the oil and gas deposits underlying the said right of way to Union Pacific was in all respects just, true and correct. Providing, however, that this Conclusion of Law shall not apply to the issuance of United States Oil and Gas Lease Serial No. Wyoming 0105263 to Union Pacific Railroad Company, on May 26, 1965, which matter is now pending on appeal by Gulf Oil Corporation to the United States Department of the Interior."

Dated this 12th day of July, 1966.

EWING T. KERR

Judge.

[APPENDIX]

FILED
United States Court of Appeals
Tenth Circuit
JUN 14 1967
WILLIAM L. WHITTAKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9095 - MAY TERM, 1967

THE STATE OF WYOMING and GULF OIL CORPORATION, a corporation,
Appellants,

v.

STEWART L. UDALL, individually and as Secretary of the Interior; ED PIERSON, individually and as Supervisor for the State of Wyoming, Bureau of Land Management, Department of the Interior; DAVID B. MORGAN, Acting Manager, Oil and Gas; Cheyenne, Wyoming Land Office, Bureau of Land Management, Department of the Interior, and UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellees.

Received
Jun 15 1967
Law Department
Oklahoma City

Appeal from the United States District Court
for the District of Wyoming

Dean W. Borthwick, Attorney General, for The State of Wyoming, Appellant.

James B. Diggs and Roger K. Allen (McClintock, Mai & Urbigkit were with them on the brief) for Gulf Oil Corporation, Appellant.

Edwin L. Weisl, Jr., Assistant Attorney General, Robert N. Chaffin, United States Attorney, Thos. L. McKevitt, Roger P. Marquis, and Edmund B. Clark, Attorneys, Department of Justice, filed a brief on behalf of Stewart L. Udall, individually and as Secretary of the Interior; Ed Pierson, individually and as Supervisor for the State of Wyoming, Bureau of Land Management, Department of the Interior; David B. Morgan, Acting Manager, Oil and Gas, Cheyenne, Wyoming Land Office, Bureau of Land Management, Department of the Interior, Appellees.

J. H. Anderson (F. J. Melia and E. T. Lazear were with him on the brief) for Union Pacific Railroad Company, Appellee.

Before BREITENSTEIN and HILL, Circuit Judges, and BROWN, District Judge.

BREITENSTEIN, Circuit Judge.

The controversy relates to the ownership of oil and gas deposits underlying a railroad right-of-way across a school land section in Wyoming. The Secretary upheld the claim of the United States. The appellants-plaintiffs brought a mandamus action under 28 U.S.C. § 1361 to compel recognition of Wyoming's title asserted under the act admitting that state to the union and granting to it for school purposes certain sections of land including those in dispute here.[1] The district court affirmed the decision of the Secretary.

The United States, pursuant to the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, conveyed to a predecessor of the appellee Union Pacific Railroad Company a 400-foot right-of-way across

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[1] Act of July 10, 1890, Ch. 664, 26 Stat. 222.

Section 16 of one township and Section 36 of another. The survey plats of these townships showing the center line of the right-of-way were approved and filed in 1877 and in 1884. The railroad was constructed and has not been abandoned.

The 1862 Act granted to the railroad a right-of-way two hundred feet on each side of the railroad center line and also granted certain alternate sections along the route. Section 3 provided that "all mineral lands shall be excepted from the operation of this act."[2] The 1864 amendment declared that the term "mineral land" as used in § 3 "shall not be construed to include coal and iron land."[3]

The Wyoming Enabling Act provided in § 4:[4]

> "That sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, * * * are hereby granted to said State for the support of common schools * * *."

Section 13 of the same act[5] provided that "all mineral lands shall be exempted from the grants made by this act."

On the date of the admission of Wyoming, the lands involved herein were not known to be mineral in character. The state has never selected any indemnity lands for any portion of the area with which we are concerned. In 1938 and 1950, Wyoming reconveyed to the United States all of Section 16 and part of Section 36. Both deeds contained a

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[2] 12 Stat. 492.

[3] 13 Stat. 358.

[4] 26 Stat. 222-223.

[5] 26 Stat. 224.

reservation of all mineral rights. In 1952, Wyoming executed an oil and gas lease covering the two sections, except for land not material to this case. Appellant Gulf Oil Corporation obtained these leases by assignment.[6]

In 1960, upon the application of the Union Pacific and on the authority of the 1930 Right-Of-Way Leasing Act,[7] the Cheyenne Land Office issued decisions inviting royalty bids from Union Pacific as holder of the right-of-way and compensatory royalty bids from Gulf as the owner of the oil and gas leases adjoining the right-of-way. Gulf appealed to the Director, Bureau of Land Management, who reversed. Union Pacific then successfully appealed to the Secretary of the Interior who decided that the United States owned the oil and gas underlying the right-of-way.

The question is one of first impression. Our attention is directed to no court decision determining whether oil and gas underlying a railroad right-of-way granted by Congress before 1871 passes to a state under a grant for school purposes. At the threshold we are met by conflicting rules. The Supreme Court has said that "land grants are construed favorably to the Government, [and] * * * nothing passes except what is conveyed in clear language."[8] It has also said that "the legislation of Congress designed to aid the common schools of the States is to be construed liberally rather than restrictively."[9] These are rules of construction and, because of the conflict, we apply neither.

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[6] The lease on Section 16 has expired but the lease on Section 36 is operative.

[7] Act of May 21, 1930, Ch. 307, 46 Stat. 373, 30 U.S.C. §§ 301-306. This act provides for the leasing by the Secretary of the Interior of oil and gas underlying "lands embraced in railroad or other rights of way acquired under any law of the United States, whether the same be a base fee or mere easement."

[8] United States v. Union Pacific Railroad Co., 353 U.S. 112, 116.

[9] Wyoming v. United States, 255 U.S. 489, 508.

We attach no significance to the provisions of the Enabling Act[10] exempting "mineral lands" from the school land grants. The established law is that in the construction of such grants the mineral or nonmineral character is to be determined by the known presence of valuable minerals on the effective date of the grant.[11] The parties agree that at the time of the admission of Wyoming the mineral character of these lands was not known.

During the period 1850 to 1871, Congress subsidized railroad construction by lavish grants from the public domain.[12] The rights-of-way here under consideration were granted during that period. In 1871, the policy changed and outright grants were discontinued.[13] The General Railroad Right-Of-Way Act was passed in 1875.[14] The language of the 1862 Act under which the Union Pacific obtained its right-of-way and the language of the 1875 Act are identical in all important respects.[15]

In considering a pre-1871 right-of-way grant to a railroad, the Supreme Court, in Northern Pacific Railway Co. v. Townsend, 190 U.S. 267, 271, said that the grant "was of a limited fee, made on an implied condition of reverter."

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10 26 Stat. 224.

11 Davis's Administrator v. Weibold, 139 U.S. 507, 518. See also Deffeback v. Hawke, 115 U.S. 392, 402; and Wyoming v. United States, 255 U.S. 489, 507.

12 Great Northern Railway Co. v. United States, 315 U.S. 262, 273. See also Chicago & North Western Railway Co. v. Continental Oil Co., 10 Cir., 253 F.2d 468, 471.

13 315 U.S. 262, 274.

14 Act of March 3, 1875, Ch. 152, 18 Stat. 482, 43 U.S.C. §§ 934-939.

15 The 1862 Act read, 12 Stat. 491, that "the right of way through the public lands be, and the same is hereby, granted * * *." The 1875 Act reads, 43 U.S.C. § 934, that the "right of way through the Public lands of the United States is granted * * *." The 1862 Act provided for a 400 foot right-of-way while the 1875 Act reduced that to 200 feet.

This statement was repeated in Rio Grande Western Railway Co. v. Stringham, 239 U.S. 44, 47, a case concerning a post-1871 grant. Great Northern Railway Co. v. United States, 315 U.S. 262, pointed out that Stringham did not consider the 1871 change in congressional policy. The Court rejected the application of the "limited fee" principle to post-1871 grants, and held that the 1875 right-of-way act granted only an easement with no rights in the underlying oil and minerals.

United States v. Union Pacific Railroad Co., 353 U.S. 112, was a suit by the United States to enjoin the railroad from drilling for oil and gas on a right-of-way granted by § 2 of the 1862 Act. In holding for the United States, the Court said that Townsend was not "an adjudication concerning the ownership of mineral resources underlying the right of way in a contest between the United States and the railroad."[16] The § 3 exemption of "mineral lands" was equated to an exemption of mineral rights and held applicable to the right-of-way granted by § 2.

In Chicago & North Western Railway Co. v. Continental Oil Co., 10 Cir., 253 F.2d 468, we considered a dispute between a railroad claiming under a right-of-way grant pursuant to the 1875 Act and the holder of an oil and gas lease covering the tract traversed by the right-of-way. We held that Great Northern controlled and that the railroad had an easement which gave it no rights to the oil and gas. In that decision, we recognized the statement in United States v. Union Pacific Railroad Co., 353 U.S. 112, 119, that the "limited fee" cases, such as Townsend, decided only that the railroads "received all surface rights to the right of way and all rights incident to a use for railroad purposes."[17] In Northern Pacific Railway Co. v. United States, 10 Cir., 277

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[16] 353 U.S. 112, 118.

[17] See 253 F.2d 468, 471.

F.2d 615, 618, a case relating to easements for canals or ditches[18] we said, on the authority of Union Pacific, that a right-of-way easement does not include underlying oil and gas.

Wyoming and Gulf assert that public policy requires that right-of-way grants made before 1871 should receive the same treatment as those made after that date; they point out that only 9,800 miles of railroad were constructed under grants made during the earlier period. They argue that the rule that title to the servient estate in a strip or gore passes without express mention in a conveyance of the encumbered tract[19] applies to rights-of-way obtained under the 1875 Act, by condemnation, and by private grants. They conclude that it should also apply to pre-1871 grants by Congress.

Logical as the argument may be, it collides with several acts of Congress. The Act of March 8, 1922, Ch. 94, 42 Stat. 414, 43 U.S.C. § 912, relates to abandoned railroad rights-of-way and provides that upon abandonment title goes to the owners of the adjoining tract without further conveyance provided that "the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals." If Wyoming and Gulf are correct in their view that whoever owns the subdivision traversed by the right-of-way already owns the oil and gas, the oil and gas reservation in the 1922 Act is a nullity.

The 1930 Right-Of-Way Leasing Act[20] requires that before the Secretary gives an oil and gas lease to the right-of-way owner, the adjoining owners must be notified and permitted to submit a bid. If Wyoming and Gulf are right, the adjacent owners would already own the oil and gas.

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[18] See 43 U.S.C. § 945.

[19] See United States v. Magnolia Petroleum Co., 10 Cir., 110 F.2d 212, 217.

[20] 30 U.S.C. §§ 301-306.

We recognize that, "The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[21] We realize that in Great Northern the Court completely disregarded the Abandoned Railroad Right-Of-Way Act and that after Great Northern such act applied only to pre-1871 grants. In the circumstances, we believe that the policy arguments are not controlling and that the decision here depends on the narrow issue of construction of the Wyoming Enabling Act in the light of the 1862 and 1864 Acts and the decisions relating thereto.

Wyoming and Gulf rest their case on the proposition that the location of a railroad right-of-way across a tract of public land of the United States does not separate the servient estate from the public domain with the result that title to the servient estate passes without express mention in a subsequent grant by the United States of the traversed tract. The United States and Union Pacific concede that this rule applies to post-1871 grants but deny its application to previous grants.

For the purposes of this case, we are not impressed with the labels applied to the title of the railroads in their rights-of-way across the public lands of the United States. The concept of "limited fee" was no doubt applied in Townsend because under the common law an easement was an incorporeal hereditament which did not give an exclusive right of possession. With the expansion of the meaning of easement to include, so far as railroads are concerned, a right in perpetuity to exclusive use and possession[22] the need for the "limited fee" label disappeared.

All parties rely on United States v. Union Pacific Railroad Co., 353 U.S. 112. That decision did not overrule Townsend. It recognized that under Great Northern the post-

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[21] Waterman S.S. Corp. v. United States, 381 U.S. 252, 269.

[22] See Midland Valley Railroad Co. v. Sutter, 8 Cir., 28 F.2d 163, 168.

1871 grants were of an easement. It pointed out that none of the previous cases "involved the problem of rights to subsurface oil and minerals."[23] The narrow holding was that the railroad did not get title to the underlying oil and gas by virtue of the statutory grant. To reach this result, the Court specifically held that the "mineral lands" exception in § 3 of the 1862 Act applied both to the § 2 grant of right-of-way and the § 3 grant of alternate sections.[24]

The application of the "mineral lands" exception to the right-of-way grant means to us that the 1864 amendment[25] saying that the term "mineral lands" does not include coal and iron land also applies to the right-of-way grant. The effect is that the railroad not only received a right-of-way with the perpetual and exclusive use of the surface but also received the right to explore for, develop, and mine the underlying coal and iron.

This is important because § 4 of the Enabling Act[26] provided that two sections in each township were granted for school purposes and "where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress" indemnity lands may be selected. We believe that the congressional intent was that if part of any section to be granted for school purposes had been disposed of under an act of Congress, the state on admission did not get that part of the section. The right to select lieu lands was given but the failure to exercise that right does not enlarge the grant. The question of whether coal and iron are now known, or ever have been known, to underly the right-of-way is immaterial. The railroad has the right to explore for coal and iron and if any is

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[23] 353 U.S. 112, 119.

[24] *Id.* at 116.

[25] 13 Stat. 356.

[26] Act of July 10, 1890, Ch. 664, 26 Stat. 223.

discovered it belongs to the railroad. Such right is in a different category from a surface easement. The grant of the coal and iron with the incidental rights of exploration and development disposed of a part of the section traversed by the right-of-way. This prior disposition served to exclude the right-of-way from the grant of school sections made by the Enabling Act.

The effect of this conclusion is that title to the servient estate did not pass with the conveyance of the encumbered tract. Instead, it remained in the United States and the United States retains the rights, specifically here the ownership of the underlying oil and gas, not granted to the railroad. The fact that the result which we reach treats pre-1871 grants differently from those made later is not controlling because that difference had its origin in a change of congressional policy relating to rights-of-way for railroads crossing the public domain. We agree with the Secretary that the oil and gas underlying the right-of-way in question are subject to disposition under the 1930 Right-Of-Way Leasing Act.

Affirmed.

SEVENTEENTH DAY, MAY TERM,
WEDNESDAY, JUNE 14, 1967.

Before Honorable Gene S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges, and Honorable Wesley E. Brown, District Judge.

STATE OF WYOMING, et al., Appellants,	)	
VS.	)	
	)	Case No. 9095
STEWART L. UDALL, INDIVIDUALLY, AND AS SECRETARY OF THE INTERIOR, et al., Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

APPENDIX B

The following is a tabulation of the miles of railroad constructed along rights of way granted by right of way provisions included in acts of Congress making grants of land in aid of railroad construction. The tabulation starts with the Act of July 1, 1862, as amended by the Act of July 2, 1864.

*Acts of July 1, 1862 (12 Stat. 489) and July 2, 1864 (13 Stat. 356)

Union Pacific Railroad Company From the Missouri River at Omaha, Nebr., to a junction with the Central Pacific Railroad in the NW-NE sec. 1, T. 6 N., R. 2 W., Utah, 5.11 miles north of Ogden.	1038.68 miles
Denver Pacific Railway Co. From Denver, Colorado, to junction with Union Pacific Ry. Co., at Cheyenne, Wyoming.	106.00 miles
Kansas Pacific Railway Co. From Missouri State line, near Kansas City to Denver, Colorado.	638.6 miles
Western Pacific Railroad Co. From Sacramento to San Jose, California.	123.16 miles
Central Pacific Railroad Co. From Sacramento, Cal., to junction with Union Pacific Ry. Co. in Sec. T. 6 N., R. 2 W., near Ogden, Utah.	737.5 miles
Hannibal & St. Joseph R.R. Co. From Atchison, Kansas to 100th mile-post near Waterville, Kansas.	100.00 miles
Union Pacific R.R. Co. From Sioux City, Iowa, to Fremont, Nebr.	101.77 miles
Burlington & Missouri R.R. Co. From Plattsmouth to Kearny Junction, Nebr.	190.75 miles

Act of March 3, 1863 (12 Stat. 772)

Leavenworth, Lawrence and Galveston R.R. Co. From Lawrence, Kansas, to the southern boundary of Kansas.	142.80 miles

Atchison, Topeka and Santa Fe R.R. Co. ——— 469.35 miles
From Atchison, Kansas, to western boundary of State near town of Coolidge.

Missouri, Kansas and Texas Ry. Co. ——— 180.50 miles
From Fort Riley to southern boundary of Kansas.

Act of July 1, 1864 (13 Stat. 339) and Act of July 26, 1866 (14 Stat. 289), and Act of July 25, 1866 (14 Stat. 236)

Missouri, Kansas and Texas Rwy. Co. ——— 155.35 miles
From southern boundary of Kansas through the Indian Territory to the Red River near Preston, Texas.

Act of May 5, 1864 (13 Stat. 66)

Wisconsin Railroad Co. ——— 257.00 miles
From Portage via Stevens' Point to Ashland, Wisconsin.

Act of May 12, 1864 (13 Stat. 72)

Sioux City and Saint Paul R.R. Co. ——— 56.25 miles
From the Minnesota boundary to a connection with Iowa Falls and Sioux City Ry. (Illinois Central).

Act of May 12, 1864 (13 Stat. 72)

Chicago, Milwaukee and Saint Paul Ry. Co. ——— 251.00 miles
From South McGregor, via Calmar to a connection with the Sioux City and Saint Paul R.R. at Sheldon, Obrien County, Iowa.

Act of July 2, 1864 (13 Stat. 365), and Joint Resolution of May 31, 1870 (16 Stat. 378)

Northern Pacific Railroad (now Railway) Company ——— 2037.81 miles

Act of July 4, 1866 (14 Stat. 87)

Southern Minnesota Railroad Company ——— 279.37 miles
From Houston to Winnebago City to Arlie on western boundary of Minnesota. Owned and operated by Chicago, Milwaukee and Saint Paul Ry. Co.

Hastings and Dakota R.R. Co. ..... 202.10 miles
From Hastings to Ortonville on western boundary of State. Now Chicago, Milwaukee and Saint Paul Ry. Co.

Act of July 23, 1866 (14 Stat. 210)

Saint Joseph and Denver R.R. Co. ..... 226.00 miles
From Elwood, Kansas to junction with Burlington and Missouri River R.R. at Hastings, Nebr., owned and operated by Saint Joseph and Grand Island R.R. Co.

*Act of July 25, 1866 (14 Stat. 239)

California and Oregon R.R. Co. ..... 304.00 miles
From junction with Central Pacific R.R. at Roseville, Calif., to junction with Oregon and California R.R. at Oregon State line.

Oregon and California R.R. Co. ..... 360.00 miles
From Portland, Oregon to junction with Calif. & Oregon R.R. at California State line.

*Act of July 27, 1866 (14 Stat. 292)

Saint Louis and San Francisco R.R. Co. ..... 89.00 miles
From Springfield, Missouri to Missouri State line (westwardly).

Santa Pacific Railroad Co., operated by Atchison, Topeka and Santa Fe Ry. Co. ..... 636.00 miles
From Isleta, N. Mex., to Colorado River.

Southern Pacific Railroad Co. ..... 495.52 miles
From San Jose, California to Needles on Colorado River.

*Act of May 4, 1870 (16 Stat. 94)

Oregon and California R.R. Co. ..... 47.50 miles
From Portland, Oregon, via Forest Grove to McMinnville, Oregon.

*Act of March 3, 1871 (16 Stat. 573)

Southern Pacific R.R. Co. ..... 346.97 miles
From Mojave, Cal. via Los Angeles to Colorado River at Yuma.

*Act of March 3, 1871 (16 Stat. 573)

New Orleans Pacific R.R. Co. From White Castle to Shreveport, Louisiana.	260.00 miles
Total	9832.98 miles

*Denotes acts which contain a removal of coal and iron land from the exception of mineral lands.

SUPREME COURT, U. S.

FILED

OCT 2 1967

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1967

No. 601

THE STATE OF WYOMING and GULF OIL CORPORATION,
Petitioners,

VERSUS

STEWART L. UDALL, individually and as Secretary of the Interior; ED PIERSON, individually and as Supervisor for the State of Wyoming, Bureau of Land Management, Department of the Interior; DAVID B. MORGAN, Acting Manager, Oil and Gas, Cheyenne, Wyoming Land Office, Bureau of Land Management, Department of the Interior, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Tenth Circuit

BRIEF IN OPPOSITION

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THE STATE OF WYOMING and GULF OIL CORPORATION,

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ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

PREFATORY COMMENT

Petitioners' statement with respect to the opinions below, jurisdiction and the statutes involved is correct. Accordingly, we will not again set these matters forth, but will direct our opposition solely to the matters which we question.

QUESTION PRESENTED

The question presented in this case was stipulated in the courts below. Petitioners have seen fit to restate the question. We believe the stipulated question more properly presents the question before the Court. As so stipulated, the question reads:

> "The question involved herein is whether the Secretary of the Interior has authority to dispose of oil and gas deposits in the Union Pacific right of way under the Act of May 21, 1930, 46 Stat. 373, as property of the United States, or whether the Secretary lacks such authority because the minerals retained by the United States under the railroad grant subsequently passed to the State of Wyoming under the Act of July 10, 1890, 26 Stat. 222, granting school land to the State. (R. 36)."

—o—

STATEMENT OF THE CASE

The petitioners correctly state the factual background of the case, but do not, in the opinion of this respondent, properly state the basis of the decision of the Secretary of the Interior in this matter, referred to on page 10 of the petition. On page 10 petitioners state:

> "* * * The basis of the Secretary's decision was that this Court had not held this right-of-way to be an easement in *Union Pacific,* as it had held post-1871 rights-of-way to be in *Great Northern Ry. Co. v. United States,* 315 U. S. 262 (1942) * * *."

This is only a partial statement of the basis of the Secretary's decision, as even a cursory reading thereof, as set forth in Appendix A, pages ix to xviii of the petition,

will demonstrate. The Secretary emphasized particularly that this Court, in *United States v. Union Pacific R. Co.*, 353 U. S. 112 (1957), the case principally relied upon by petitioners here and in the proceedings below, did not overrule the case of *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267 (1903), which held that upon the construction of the railroad prior to the effective date of the filing of homestead entries on the particular sections traversed by it, "the land forming the right of way therein was taken out of the category of public lands subject to preemption and sale, and the land department was therefore without authority to convey rights therein." In other words, in the *Townsend* case the Supreme Court has specifically held that the grant of right of way to Union Pacific's predecessor and the construction of the railroad over it had taken the land out of the category of public lands and it was no longer subject to disposal by a general grant. The Secretary completed his analysis of *Union Pacific* by saying at page xviii of the Appendix to the petition:

> "Accordingly, it is concluded the *Union Pacific* case did not change the previously established law that only the United States had the rights to minerals underlying pre-1875 act rights-of-way, that the oil and gas deposits underlying the Union Pacific's right-of-way are in the United States, and that the land office properly sought to dispose of them pursuant to the act of May 21, 1930, supra."

Further, the petitioners purport to state the holding of the Court of Appeals as follows (see page 11 of the petition):

> "Petitioners then appealed to the Court of Appeals. It too held that the oil and gas deposits under the right-of-way were excluded from Wyoming's school land grant, but upon a still different construction of the applicable statutes and interpretation of this Court's decision in *Union Pacific.* It held that, in consequence of § 4 of the 1864 Act removing coal and iron land from the 'mineral lands' exception in the railroad's grant, the railroad owned the coal and iron deposits underlying its right-of-way and that because of such ownership, Wyoming acquired no interest in the right-of-way upon the later grant to it of the traversed sections. App. A, *infra,* pp. xxx-xxxix."

Here too the petitioners do not adequately state the Court's holding. The Court of Appeals held that this Court in *Union Pacific* did not overrule *Northern Pacific Ry. Co. v. Townsend,* supra, and pointed out that the holding in *Union Pacific* was premised on the proposition that the "mineral lands" exception in Section 3 of the Act of July 1, 1862, 12 Stat. 489, 491-492, applied to the Section 2 grant of right of way as well as the grant of alternate sections in aid of construction; in other words, that it applied to both the right of way grant and the land grant. The Circuit Court then held that the amendment contained in Section 4 of the Act of July 2, 1864, 13 Stat. 356, 358, to the effect that the exception of mineral lands as used in Section 3 of the 1862 Act does not include coal and iron, likewise applied to the right of way grant, the effect being that the railroad not only received a right of way with the perpetual and exclusive use of the surface, but also received the right to explore for, develop, and mine the underlying coal and iron. The Circuit Court, then relying upon the proposition that Section 4 of the

Enabling Act, 26 Stat. 222, 224, under which Wyoming received its school lands, provided "where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress," indemnity lands could be selected, concluded that if any part of any section to be granted for school land purposes had been disposed of under an act of Congress, the state on admission did not get that part of the section, and reasoned that the grant of the exclusive and perpetual use of the surface, together with the grant of the coal and iron to the railroad with the incidental rights of exploration and development, disposed of the part of the section traversed by the right of way within the meaning of the school land grant so as to exclude it therefrom.

From the foregoing, which, of course, only purports to present a very summary statement of the Court's opinion, it is clear that the petitioners have greatly oversimplified in their petition for a writ of certiorari the holding of the Court of Appeals which they seek to have this Court reverse.

ARGUMENT

Union Pacific's argument will take up seriatim the "Reasons for Granting the Writ" as set forth in the petition. Our first proposition is that:

1. The Court of Appeals has construed the applicable statutes in a manner in accord with this Court's construction in United States v. Union Pacific R. Co., 353 U. S. 112 (1957).

The basic reason which petitioners allege as the ground for the granting of a writ is that

> "'Although the question is novel, construction of the applicable statutes is not, and the Court of Appeals has construed them in a manner which is not in accord with this Court's construction in *Union Pacific.* The Court of Appeals assumed, without discussion, that this Court left open the question whether § 4 of the amending Act of 1864 removing coal and iron land from the 'mineral lands' exemption contained in the 1862 Act, had any effect on the railroad's right-of-way grant.
>
> "Proceeding on this assumption and the 'narrow holding' of *Union Pacific* 'that the railroad did not get title to the underlying oil and gas by virtue of the statutory grant,' App. A. *infra,* p. xxxviii, the Court of Appeals construed the effect of the 1864 amendment to be that by the 1862 Act:
>
> > " 'the railroad not only received a right-of-way with the perpetual and exclusive use of the surface, but also received the right to explore for, develop and mine the underlying coal and iron.'
>
> "It concluded that Union Pacific's right to mine the coal and iron elevated its estate in the right-of-way to more than a 'surface easement' and that, accordingly, 'title to the servient estate did not pass with the conveyance of the encumbered tract.' "

First of all, may we flatly state that the statement contained in the foregoing that

> "Although the question is novel, construction of the applicable statutes is not, and the Court of Appeals has construed them in a manner which is not in accord with this Court's construction in *Union Pacific.*"

is not correct. The construction which the Court of Appeals has placed on *Union Pacific* is strictly in accord with the Supreme Court's holding.

In *Union Pacific* the United States brought an action in the Federal District Court for Wyoming seeking to enjoin Union Pacific from using its right of way for the purpose of removing oil and gas and asking that title to minerals underlying the right of way be quieted in the United States. This litigation terminated in a decision of the Supreme Court holding that under the language of the granting acts, title to the oil and gas is in the United States and quieted in it the title to the oil and gas in the entire right of way of Union Pacific. In considering this matter, it should be borne in mind that under the Act of July 1, 1862, which was amended by the Act of July 2, 1864, there were two separate grants to Union Pacific's predecessor, i. e., a grant of right of way, which was covered by Section 2 of the Act of July 1, 1862, and a land grant in aid of construction separate and distinct from the right of way grant, set forth in Section 3. "Mineral lands" were excepted from the land grant. Section 3 of the Act of July 1, 1862, was amended by Section 4 of the Act of July 2, 1864, to provide in effect that the exception of "mineral lands" did not include coal and iron. Undoubtedly this was done because it was considered that the minerals coal and iron would be of value to the railroad company in aid of construction of the railroad, the basic purpose for the land grant. The Supreme Court in *Union Pacific,* in determining that the grant of right of way contained in Section 2 of the Act of July 1, 1862, did not include the oil and gas, relied

upon Section 3 of the Act (the section having to do with the land grant, as distinguished from the right of way grant), which provided:

> "* * * That all mineral lands shall be excepted from the operation of this act * * * *"

and reasoned from this, at page 114 of the opinion, that:

> "* * * whatever rights may have been included in 'the right of way,' mineral rights were excepted by reason of the proviso in §3 excepting 'mineral lands.'"

In other words, the Supreme Court considered the land grant Section 3 in pari materia with the right of way grant in Section 2. As pointed out above, Section 3 of the Act of July 1, 1862, was amended by Section 4 of the Act of July 2, 1864, insofar as the exception of mineral lands was concerned, so that it read:

> "* * * And the term 'mineral land,' wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land."

The effect of this amendment is clear, following the Court's reasoning—while oil and gas in the right of way were excepted from the grant and retained by the United States, coal and iron were not.

At page 13 of their petition, the petitioners state that:

> "This Court did not note that coal or iron or any other minerals were not embraced in the reservation of 'all mineral rights' * * *."

This is correct, but there was not any necessity for the Court to do so. The Court in *Union Pacific* was considering

only the question of the ownership of the oil and gas, not coal and iron; the phrase "mineral rights" must be considered in the light of what was before the Court. The fact that the decision in *Union Pacific* did not quiet title in the United States to coal and iron was recognized in the Judgment on Mandate filed in *Union Pacific* (Stip. Ex. 4, R. 40, 53-54), in which it was specifically provided in paragraph 5 thereof:

> "As used in this judgment, the term 'minerals' does not include coal and iron and this judgment does not purport to decide the rights of the parties with respect to the ownership of or right to remove coal and iron deposits in and from said right of way. As far as any issues relating to coal and iron deposits are concerned, this judgment is entered without prejudice to the rights of either party."

While the ownership of coal and iron was, therefore, not disposed of in that case, the effect of the Court's reasoning is clear, and that is, that coal and iron deposits underlying the right of way were granted to Union Pacific's predecessor under the right of way grant and are now owned by Union Pacific. The fact that title to the coal and iron is in the Union Pacific is irreconcilable with the contention of the petitioners that Union Pacific has a mere surface interest in the right of way.

2. The Court's decision in Great Northern Ry. Co. v. United States, 315 U. S. 262 (1942), and the current regulations issued by the Secretary in consequence of that decision are not in point in this case and the decision of the Court of Appeals is not inconsistent therewith.

At page 14 of their petition the petitioners allege that the decision of the Court of Appeals, as well as of the Secretary,

> "also appears to be inconsistent with this Court's decision in *Great Northern* and with the current regulation which the Secretary issued in consequence of that decision.",

here referring to the case of *Great Northern Ry. Co. v. United States*, 315 U. S. 262 (1942), and a regulation, the case and the regulation both having to do with right of way which was granted under the General Right of Way Act of March 3, 1875, 18 Stat. 482, not under the Acts under consideration here. That this Act was not applicable to right of way granted under the Acts of 1862 and 1864, supra, was clearly recognized by the Supreme Court in *Union Pacific*.

In the *Great Northern* case, the Supreme Court specifically distinguished between the limited fee cases applying to the 1862-1864 right of way and the cases arising under grants made subsequent to 1871, pointing out at page 273:

> "* * * The Act was the product of a period, and, 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.' "

The Court then went on to say at pages 273-275 of the opinion as follows:

> "Beginning in 1850, Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain. This policy incurred great public disfavor, which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872:

"'*Resolved,* That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people require that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law.' Cong. Globe, 42d Cong., 2d Sess., 1585 (1872). After 1871 outright grants of public lands to private railroad companies seem to have been discontinued. * * *

"The burden of this special legislation moved Congress to adopt the general right of way statute now before this Court. Since it was a product of the sharp change in Congressional policy with respect to railroad grants after 1871, it is improbable that Congress intended by it to grant more than a right of passage, let alone mineral riches. The presence in the Act of § 4, which, as has been pointed out above, is so inconsistent with the grant of a fee, strongly indicates that Congress was carrying into effect its changed policy regarding railroad grants."

Thus, it is perfectly clear that the Supreme Court in *Great Northern* was making and did make a clear distinction between the grant involved in the *Great Northern* case and the grants involved prior to 1872. At page 119 of the opinion in *Union Pacific* the Court quoted from the *Great Northern* case and stated that:

"* * * In that case we noted that a great shift in congressional policy occurred in 1871: *that after that period only an easement for railroad purposes was granted, while prior thereto a right of way with alternate sections of public land along the right of way had been granted.* In the latter connection we said, 'When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is

little reason to suppose that it intended to give only an easement in the right of way granted in the same act.' " (Emphasis supplied.)

While the Court went on to hold that the decision was not pertinent to the case then before it because in the *Great Northern* case there had been no grant of a right of way with a reservation of "mineral land," it did not in any way suggest that the right of way involved in the *Great Northern* case, denominated as an easement, was of the same nature as the right of way granted under the Acts of 1862 and 1864. Obviously, if the Court's opinion was that the rule in *Great Northern* was controlling, it would have simply disposed of *Union Pacific* on that ground; this, as we have noted, it did not do.

In view of the foregoing, the fact that the regulations cited, which as above mentioned were issued under the Act of 1875 and Acts subsequent thereto, do not apply is evident. The regulations were promulgated in a decision of the Department of the Interior to be found in 37 L. D. commencing at page 787. That these regulations refer only to 1875 and subsequent grants of right of way is evident, the right of way statutes specifically referred to being that of March 3, 1875, 18 Stat. 482, that of March 3, 1899, 30 Stat. 1233, and the Act of February 7, 1905, 33 Stat. 702.

3. The importance of the question is not such as to justify the grant by this Court of a writ of certiorari.

Finally, at pages 16 and 17 the petitioners state:

"The question here presented is an important one, since the interests of not less than seventeen States, as well as countless individuals, will be affected, if not actually determined by the decision of this case.",

and then go on to show the mileage of railroad rights of way in various states, not only of Union Pacific but of other railroads constructed pursuant to "five other grants which are similar to Union Pacific's." It appears here that the other individuals to whom the petitioners have reference are the holders of lands, traversed by such right of way, under homestead patents, since petitioners' final conclusion is that

> "* * * It would seem to follow that decision here will in practical effect determine the rights of all of the States and individuals to whom the United States has granted or patented tracts crossed by the rights-of-way of these land grant railroads."

The tabulation of mileage of the various railroads' right of way set forth in the Appendix to the petition we are not in a position to dispute, but we suggest that a mere recital of the mileage is irrelevant in itself. The question involved in this case has to do basically not with the entire right of way mileage of various railroads, but with the right of way as it crosses school land sections of various states. Just how many school land sections may have been crossed by such right of way we do not know. It is entirely conceivable that in certain of the states no school land sections were crossed. This is a matter with respect to which the petitioners have not seen fit to inform the Court. Certainly in urging a point of this kind it should be their obligation to do so. A mere statement of mileage standing alone, as mentioned above, does not in and of itself mean anything.

The individuals referred to constitute either patentees or successors in interest to patentees of lands traversed by

Union Pacific's right of way. To say that this decision will in practical effect determine their rights implies that there has been no determination of their rights. This is not correct. As previously mentioned, the decision of this Court in *Northern Pacific Ry. Co. v. Townsend,* supra, decided in 1903, held that patentees under homestead patents did not secure any interest in the right of way or the land occupied by right of way granted to railroads under the Acts of 1862 and 1864. This case was referred to three times with apparent approval by this Court in *Union Pacific,* the case most relied upon by petitioners, and certainly was not overruled. At page 270 of the decision in *Northern Pacific Ry. Co. v. Townsend,* supra, Mr. Justice White, in delivering the opinion of the Court, stated:

> "At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to pre-emption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions."

Accordingly, this decision affects only state school lands actually traversed by such right of way and not individuals holding under patents.

Importance such as to justify the granting of a writ must arise, if at all, as we understand it, from the effect of the decision of the Circuit Court of Appeals if permitted

to stand. We have heretofore endeavored to show that in its present status, this decision simply enunciates established rules of law.

In this case, petitioners seek to have the Court reverse the decision of the Circuit Court of Appeals by construing its holding in *Union Pacific* in a manner which would be totally inconsistent with its reasoning in determining that Union Pacific did not secure title to the oil and gas underlying its right of way and quieting title thereto in the United States, and by overruling its prior decision in *Northern Pacific Ry. Co. v. Townsend,* supra. The effect of such a decision by this Court would be to strip from the United States title to the oil and gas underlying all such railroad right of way and vest it in the abutting landowner, whether a state, an individual landowner, or the railroad itself, except in those cases where the abutting land is still owned by the United States; it would, in a large measure, render nugatory the Court's holding in *Union Pacific* insofar as title to the oil and gas underlying such right of way was held to be in the United States.

CONCLUSION

In the opinion of this respondent, petitioners have not made a showing entitling them to a review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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278-612—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 601

THE STATE OF WYOMING AND GULF OIL CORPORATION, PETITIONERS

v.

STEWART L. UDALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. xxx–xxxix) is reported at 379 F. 2d 635.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1967 (Pet. App. xl). The petition for a writ of certiorari was filed on September 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether oil and gas deposits retained by the United States in a railroad right of way grant under

the Act of July 1, 1862, 12 Stat. 489, passed to the State of Wyoming under the Act of July 10, 1890, 26 Stat. 222.

STATUTES INVOLVED

Insofar as is here relevant, the Act of July 10, 1890, 26 Stat. 222, provides:

> SEC. 4. That sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, * * *.

Sections 2 and 3 of the Act of July 1, 1862, 12 Stat. 489, 491–492, Section 4 of the Act of July 2, 1864, 13 Stat. 356, 358, amending the Act of July 1, 1862, and the pertinent provisions of the Right of Way Leasing Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. 301, 303, are printed at Pet. 3–7.

STATEMENT

Pursuant to the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, the United States conveyed a right of way to a predecessor of the Union Pacific Railroad Company. The conveyance became effective on December 20, 1884, when the plat of survey of the line was approved. Subsequently, the government's title to certain sections in each township passed to the State of Wyoming for school purposes upon its admission to the Union. Act of July 10, 1890, 26 Stat. 222. The right of way in question lies in such a section.

On October 2, 1952, the State of Wyoming leased the entire section for the removal of oil and gas to an

individual who later assigned the lease to the Gulf Oil Corporation. The lease made no reference to the right of way, and purported to embrace the full acreage in the section.

In 1960, Union Pacific successfully applied, under the provisions of the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. 301, for a right of way oil and gas lease. The Secretary of the Interior ruled that the mineral rights underlying the right of way had been reserved to the United States in the right of way grant and had not passed to the State by the Act of July 10, 1890, admitting Wyoming to statehood.

This present action was then commenced in a federal district court, seeking relief from the Secretary's decision. The district court dismissed the complaint and, on appeal, the court of appeals affirmed. The basis of its decision was—

> that the congressional intent was that if part of any section to be granted for school purposes had been disposed of under an act of Congress, the state on admission did not get that part of the section. The right to select lieu lands was given but the failure to exercise that right does not enlarge the grant.

ARGUMENT

1. The decision of the court of appeals is correct. It is true that this Court in *United States* v. *Union Pacific R. Co.*, 353 U.S. 112, held that the oil and gas deposits underlying the right of way granted pursuant to the Acts of July 1, 1862, and July 2, 1864, did not pass to the railroad, but were retained by the United States. However, this does not mean that the con-

veyance was of a mere surface easement. As the court of appeals pointed out (Pet. App. xxxviii), under Section 4 of the 1864 Act the railroad was granted the right to extract coal and iron, indicating that more than a mere surface easement had been granted. No interest in the strip passed to the State. The different conclusion sought by petitioners—vesting in them the rights to the underlying oil and gas—would, as noted by the court of appeals (Pet. App. xxxvi), render nugatory subsequent statutes specifically dealing with the retained oil and gas deposits—including the very Act (Act of May 21, 1930, 30 U.S.C. 301, 303) under which the Secretary issued an oil and gas lease to Union Pacific in this case.

2. The decision is not in conflict with any decision of this Court or of any other court of appeals, and involves only the application of an historic distinction between 1862 and 1864 right of way grants, on the one hand, and easements under the Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. 934 *et seq.*, on the other. See *Union Pacific, supra,* and *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262. Moreover, the precise extent of these nineteenth century grants is of limited importance today.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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